Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

IN THE

Supreme Court of the United States

CLEMENTON BOARD OF EDUCATION,

Petitioner,

v.

P.N., an infant, individually and by his parent and legal guardian, M.W.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Third Circuit reversed the United States District Court for the District of New Jersey, which had dismissed an action for attorney's fees pursuant to the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §1400, et seq. The parties to the dispute - a local educational agency ("LEA") under the IDEA and a student eligible for services there under - had settled a due process matter that had been filed by the family, without a hearing having taken place. Attorney's fees were then sought in the District Court. Although rejecting the LEA's position that the Consent Orders entered by the Administrative Law Judge ("ALJ") failed to satisfy the standards enunciated by this Court in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001), the District Court nonetheless dismissed the Complaint on the grounds that the relief obtained was *de minimis*.

The Third Circuit reversed. While agreeing with the District Court that the *Buckhannon* standard was satisfied, in disagreement with at least one other circuit (the Eighth), the Third Circuit found that reimbursement of $425 plus restoration of the status quo existing before the filing of the due process petition was enough to justify award of a fee.

Two questions are presented:

1. Is a Consent Order, required by local administrative rules to insure that no public policy is violated, which does no more than recount the terms of a settlement, sufficient judicial *imprimatur* to satisfy the principles set out in *Buckhannon*?

2. Is the recovery of $425 in expenses plus restoration of the status quo, without a change in the educational program being provided, sufficient relief to warrant an award of an attorney's fee under the IDEA?

LIST OF PARTIES

The parties are listed in the caption. In addition, appearing as *amicus curiae* in support of respondents were the following:

Alliance for the Betterment of Citizens with Disabilities, the American Civil Liberties Union of New Jersey, ARC of New Jersey, Bazelon Center for Mental Health Law, Becoming Educated and Motivated About Education, The Center for Law and Education, The New Jersey Center for Outreach and Services for the Autism Community, Disability Rights Advocates, The Education Law Center, The Essex County Bar Association, International Dyslexia Association, The National Association of Protection and Advocacy Systems, The New Jersey Coalition for Inclusive Education, Inc., New Jersey Protection and Advocacy, Inc., The Rutgers School of Law-Newark Special Education Clinic, The Special Education Leadership Council, The Statewide Parent Advocacy Network, and United Cerebral Palsy Associations

CORPORATE DISCLOSURE STATEMENT

The Clementon Board of Education ("CBE" or the "Board") is public body within the State of New Jersey.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 442 F.3d 848 (3d Cir. 2006). The opinion of the United States District Court for the District of New Jersey is unreported. See appendices A-B.

STATEMENT OF JURISDICTION

This court's jurisdiction is invoked under 28 U.S.C. §1254(1).

The Third Circuit's opinion was rendered on April 5, 2006.

STATUTORY PROVISIONS INVOLVED

Title 20 United States Code, Section 1415(i)(3)(B).

AWARD OF ATTORNEYS' FEES - In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to parents of a child with a disability who is the prevailing party.

STATEMENT OF THE CASE

Respondent P.N. is a child eligible for services under the IDEA. His family is resident in Clementon, New Jersey, and CBE is the LEA responsible for providing his education, including observing the requirements of the IDEA.

P.N., born in 1988, suffers from Attention Deficit Hyperactivity Disorder. During the 2000-01 school year, he was expelled after sending a note threatening to blow up the school. He was home schooled for the rest of that school year, and was allowed to return for 2001-02. During that 2001-02 school year, he was suspended for disruptive behavior.

A petition for due process was filed on behalf of P.N. on October 25, 2001. The relief sought was a return to school, reimbursement of the cost of psychological services required by the Board after the threat to blow up the school, preparation of plan under §504 of the Rehabilitation Act of 1973, and evaluation of P.N. by an independent child study team.

A settlement was reached by the parties and was presented to the court. A Consent Order was entered by the ALJ on November 1, 2001, which provided:

> 1. On 11/5/01, C.S.D. [Clementon School District] shall return P.N. to his current placement that was in place prior to his removal on 10/16/01.
>
> 2. On 11/5/01, C.S.D. shall provide P.N. with appropriate accommodation in regards [to] any behaviors which may interfere with P.N.'s ability to receive an education. Dr. Paul

Booker may provide assistance in the development of said accommodation. If such assistance is provided, on the return date, this forum shall determine if C.S.D. should reimburse petitioners for Dr. Booker's fees.

3. P.N. is to receive an Independent Child Study Team Evaluation in accordance with the procedures outlined in N.J.A.C. 1:6A-14.3 at C.S.D.'s expense. The Social Work evaluation shall be performed by C.S.D. The psychiatric evaluation shall be performed by Dr. Raymond H. Schweibert, M.D. If counsel cannot agree on who will do the learning and school psychology evaluations by 11/7/01, each shall submit three names for each evaluation to this forum with the right to object to one of the three proposed evaluators for each evaluation....

4. C.S.D. shall provide petitioners transportation to and from all evaluations.

5. This matter shall reconvene on 12/5/01 before the undersigned A.L.J.

6. This decision is final pursuant to 20 *U.S.C.A.* § 1415(i)(1)(A) and 34 *C.F.R.* § 300.510 (1999). If either party feels that this decision is not being fully implemented, this concern should be communicated in writing to the Director, Office of Special Education Programs.

A second Consent Order, dated February 13, 2002, read:

1. Respondent [C.S.D.] will pay the parents in the amount of $425.00 in satisfaction of

> petitioners' claims for reimbursement for the costs of psychological treatment and psychiatric services to date, said payment to be made no later than March 25, 2002.
>
> 2. Respondents will pay the reasonable costs of attendance at the IEP [Individualized Education Program] meeting of psychologist Paul Booker, . . . said meeting to be scheduled on a date as soon as possible, convenient to all participants, including Dr. Booker, said payment to be made no later than 30 days after said meeting.
>
> 3. The remaining claims raised in the petition of appeal and subsequent amendments, including petitioners' allegations that the respondent violated their rights to timely receipt of student records, are dismissed.
>
> 4. The issue of counsel fees is reserved for decision by a court of competent jurisdiction or for amicable resolution between the parties.
>
> 5. This decision is final pursuant to 20 *U.S.C.A.* § 1415(i)(1)(A) and 34 *C.F.R.* § 300.10 (1999).

Subsequently, Respondents filed an action in the United States District Court for the District of New Jersey, seeking an award of attorneys' fees. On motion by Petitioner, the District Court dismissed the Complaint. Although agreeing with Respondents that the Consent Orders satisfied *Buckhannon*, the District Court found the relief obtained to be *de minimis*, finding that Respondents failed "to achieve any relief on the merits of the claim that materially altered their legal relationship with CBE." Appendix

B at p. 34a.

In disagreement with the District Court, the Third Circuit declared that the legal relationship between the parties had been changed by the return to school and by CBE's compliance with the IDEA. Appendix A at p. 16a.

REASONS FOR ALLOWANCE OF THE WRIT

On both issues presented by this Petition - 1) the level of judicial imprimatur needed under *Buckhannon* to sustain an award of attorneys' fees and 2) what constitutes success under the IDEA sufficient to warrant an award of fees - there is a split between the Circuit courts and a need for this Court to present guidance to the Circuits.

I. REVIEW IS NECESSARY TO RESOLVE THE CONFLICT BETWEEN THE THIRD CIRCUIT AND AT LEAST ONE OTHER CIRCUIT AS TO WHETHER THE MERE USE OF THE TERM "CONSENT ORDER" AUTOMATICALLY SATISFIES *BUCKHANNON*.

In reaching its decision that the Consent Orders herein satisfied Buckhannon, the Third Circuit put itself directly at odds with the Eighth Circuit's decision in *Christina A. v. Bloomberg*, 315 F.3d 990 (8th Cir. 2003). Moreover, it is also arguably inconsistent with the Fourth Circuit's decision in *Smyth v. Rivero*, 282 F.3d 268 (4th Cir. 2002) as well as the First Circuit in *Smith v. Fitchburg Public Schools*, 401 F.3d 16 (1st Cir. 2005), and the Federal Circuit in *Rice Services Ltd. v. United States*, 405 F.3d 1017 (Fed. Cir. 2005).

The key to *Buckhannon*, which was ignored by the Third Circuit herein, is that what needs to be determined, apart from automatic reliance on terms such as "Consent Order," is whether or not there is really judicial *imprimatur* of the result reached. In *Christina A.*, *supra*, the Eighth Circuit rejected an attorney's fee application where a settlement was reached and the District Court held a fairness hearing pursuant to F.R.C.P. 23(e) and approved the

settlement. Although the District Court awarded fees, the Eighth Circuit reversed.

What makes *Christina A.* particularly relevant to this case is the analogy between the F.R.C.P. 23(e) hearing and the Consent Orders entered by the ALJ in this matter. The F.R.C.P. 23(e) hearing is required in class actions, and so is review of settlements by ALJs in New Jersey. Pursuant to N.J.A.C. 1:1-19.1, all settlements of administrative proceedings must be the subject of a final decision attesting to the lack of inconsistency with the law. Thus, the Consent Orders here were nothing more than rote exercises required to allow the settlements to go through. How is that judicial *imprimatur*?

Attorney's fees were also denied in *Fitchburg*, *supra*. Therein, the First Circuit affirmed the lower court's denial of prevailing party status. In a settlement, all the relief sought in the due process petition was received. Then an attorney's fee action was instituted.

The importance of *Fitchburg* lies in the First Circuit's discussion of what constitutes *imprimatur*. A final order dismissing the case was not enough. Although the Massachusetts hearing officer had exerted pressure on the Fitchburg district to resolve the due process case, in the end "the Hearing Officer only was requiring Fitchburg to follow through with what Fitchburg had voluntarily promised to do." 401 F.3d at 27.

In *Rice Services*, *supra*, the Federal Circuit refused to allow a district court to convert a "catalyst theory" case into one satisfying *Buckhannon* through the device of entering an Order directing that the "remedial action described and promised in

defendant's submission shall be undertaken." 405 F.3d at 1027.

> Were we to hold otherwise, the Court's holding in Buckhannon could be easily circumvented by any order "directing" a party to take action. *Ibid.*

Here, the ALJ did not "approve" the settlement between CBE and respondents. All she did was enter an Order acknowledging what they had agreed upon, and dismissed the case on that basis. She did not direct CBE to follow through on the settlement terms, she merely recited what the agreement included. There was no retention of jurisdiction to oversee the settlement.

This Court has expressly ruled that the right to enforce a settlement does not satisfy the requirement in *Farrar v. Hobby*, 506 U.S. 103, 113 (1992) that, to prevail for attorney's fee purposes, there must be some document altering the legal relationship between the parties.

> Enforcement of the settlement agreement, however, whether through award of damages or decree of specific performance is more than just a continuance or renewal of the dismissed suit, and hence requires its own basis for jurisdiction. *Kokkonen v. Guardian Life Insurance Co. of America*, 511 U.S. 375, 387, 114 S. Ct. 1673, 1676, 128 L. Ed. 2d 391, 396 (1994).[1]

On the surface, it may appear that the Consent Orders in this case meets the *Kokkonen* standard.

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[1] *Kokkonen* was cited in *Buckhannon* at n.7.

The terms of the settlement are incorporated into the Orders. On closer analysis, however, there is one vital defect. There is no retention of jurisdiction of the court to oversee compliance; in fact, it is expressly stated that the proceedings are concluded.

> A consent decree, because it is entered as an order of the court, receives court approval and is **subject to oversight** attendant to the court's authority to enforce its orders, characteristics not typical of settlement agreements. ... A consent decree, because of its "hybrid nature," is a special case; although it is a privately negotiated form of relief and "does not always include an admission of liability by the defendant," it nevertheless involves judicial approval **and oversight** that may suffice to demonstrate the requisite "court-ordered change [in] the legal relationship between [the plaintiff] and the defendant." *Smyth v. Rivero*, 282 F.3d 268, 281 (4th Cir. 2002) (emphasis added), quoting *Buckhannon*.

It is important to go beyond the name attached to the document relied upon. The lack of the terminology "consent order" does not rule out sufficiency to support attorney's fees. *Smyth*, *supra*, 282 F.3d at 281. Concomitantly, the mere use of that nomenclature should not automatically be enough. There needs to be an assessment of whether or not the necessary judicial oversight is implicated. Even that may not be enough. See, *Christina A. v. Bloomberg*, *supra*. Here the ALJ merely declared the proceedings over (final decision), without any retention of jurisdiction.

The decisions discussing *Buckhannon* all have a common thread. There must be more than a settlement, which can be sued upon for enforcement. A court must not only approve a settlement, it must retain jurisdiction to enforce it. In order for there to be a consent decree within the meaning of *Buckhannon*, there must be the availability of a citation for contempt for non-compliance. *Hazen ex. rel. LeGear v. Reagen*, 208 F.3d 697, 699 (8th Cir. 2000), citing *Benjamin v. Jacobson*, 172 F.3d 144, 157 (2d Cir. 1999).

II. REVIEW IS NECESSARY TO RESOLVE A CONFLICT BETWEEN THE CIRCUITS AND SET A STANDARD UNDER THE IDEA FOR THE LEVEL OF RELIEF THAT RISES ABOVE DE MINIMIS AND WARRANTS AN AWARD OF ATTORNEY'S FEES.

In reaching its decision in this case, the Third Circuit set the standard for relief needed to sustain an award of fees at an unconscionably low level, placing it at odds with this Court's ruling in *Farrar*, *supra*, as well as with recent decisions of the Seventh and Ninth Circuits in which success under the IDEA, greater than what respondents achieved here, was still found to be insufficient to justify a fee.

In *Linda T. and Gene A. v. Rice Lake Area School District*, 417 F.3d 704 (7th Cir, 2005), the parents wanted the child placed full time at the regular Middle School rather than half-time each at the Middle School and a special education facility. The ALJ accepted the half-day each placement, but found the district's Individualized Education Plan ("IEP") for the child to be insufficient in a number of respects. These included lack of specificity as to

mainstreaming and as to autism training. The school district was ordered to revise the IEP accordingly.

The District Court found the success achieved to be *de minimis* and denied fees. The Seventh Circuit affirmed. It specifically referenced the District Court's finding that the success was *de minimis* as it did not require the school district "to provide [the child] with any new or additional services." 417 F.3d at 707. It further referenced its own decision in *Monticello School District No. 25 v. George L.*, 102 F.3d 895 (7th Cir. 1996), in which, even though the hearing officer found that George had not been offered a Free Appropriate Public Education ("FAPE"), he had not been placed in the private school sought, and no fee was warranted.

> A party "prevails" for purposes of federal fee-shifting statutes when he or she obtains "actual relief on the merits" of a claim that "materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Farrar, 506 U.S. at 111-12.* However, the Supreme Court in Farrar held that "in some circumstances, even a plaintiff who formally 'prevails' . . . should receive no attorney's fees at all." *Id. at 115* (citation omitted); *Monticello Sch. Dist. No. 25 v. George L., 102 F.2d. 895, 907 (7th Cir. 1996).* The prevailing party inquiry "does not turn on the magnitude of relief obtained," but the size of the fee award does. *Farrar, 506 U.S. at 114.* The Supreme Court has said that "the most critical factor" in determining the reasonableness of a fee award" is the degree of success obtained." *Hensley v. Eckerhart, 461*

> *U.S. 424, 436, 76 L. Ed. 2d. 40, 103 S. Ct. 1933 (1983).* Therefore, "the degree of the plaintiff's success in relation to the other goals of the lawsuit is a factor critical to the determination of the size of a reasonable fee, not to eligibility for a fee award at all." *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782, 790, 103 L. Ed. 2d. 866, 109 S. Ct. 1486 (1989).* The reasonable fee award for a prevailing plaintiff who obtains only a "Pyrrhic victory" is zero. *Farrar, 506 U.S. at 117* (O'Connor, J., concurring). 417 F.3d, at 708.

The Seventh Circuit also relied upon legislative history.

> This interpretation of the statute is reinforced by a House Report - cited by William's parents and an amicus - which accompanied the draft legislation:
>
> > The Committee believes that the IEP process should be devoted to determining the needs of the child and planning for the child's education with parents and school personnel. To that end, the bill specifically excludes the payment of attorneys' fees for attorney participation in IEP meetings, unless such meetings are convened as a result of an administrative proceeding or judicial action.
> >
> > . . . .
> >
> > Questions have been raised regarding the relationship between the extent of success of the parents and the amount of

> attorneys' fees a court may award. In addressing this question, the Committee believes the amount of any award of attorneys' fees to a prevailing party under part shall be determined in accordance with the law established by the Supreme Court in *Hensley v. Eckerhart, 461 U.S. 424, 76 L. Ed. 2d. 40, 103 S. Ct. 1933 (1983),* and its progeny.
>
> As we stated in the 1986 report accompanying the legislation that added the attorneys' fees provisions: "It is the committee's intent that the terms 'prevailing party' and 'reasonable' be construed consistent with the U.S. Supreme Court's decision in *Hensley v. Eckerhart, 461 U.S. 424, 440 76 L. Ed. 2d. 40, 103 S.Ct. 1933 (1983).*"

H.R. REP. NO. 105-95, at 105-06 (1997), reprinted in 1997 U.S.C.C.A.N. 78, 103. When the Supreme Court held in Farr that de minimis success on the merits will not support an award of attorneys' fees, it relied explicitly on Hensley See *Farrar, 506 U.S. at 114.* If "the most critical factor in determining the reasonableness of a fee award is the degree of success obtained," *Hensley, 461 U.S. at 436*, it follows that there is a certain point below which the plaintiffs' success will support no award at all. Nothing in the 1997 fee-limiting amendments to the IDEA affects this principle, derived for *Farrar and Hensley.*

The district court reasonably concluded that although William's parents achieved

> something of legal significance at the due process hearing, their victory was *de minimis* and did not justify an award of fees. This was not an abuse of discretion. The judgment of the district court is AFFIRMED. *Id.* at 710.

Just this year, the Ninth Circuit decided *Joseph Park v. Anaheim Union High School District*, 444 F.3d 1149 (9th Cir. 2006). The Hearing Officer found that Joseph had been denied FAPE, on both procedural grounds and a temporary failure to implement the IEP. However, the school district prevailed on all other issues. Affirming the denial of attorney's fees, the Ninth Circuit opined:

> The district court did not abuse its discretion by finding that the District prevailed on "all significant issues" and the Appellants prevailed only "on some minor issues." Though Appellants obtained some relief (a finding of denial of a free and appropriate public education for one extended school year and one period of less than three months, limited compensatory services awarded directly to the teachers, supplemented self-help goals and requiring the District to conduct a new functional behavior assessment and implement a behavior intervention plan), the District prevailed on all procedural violations issues and the larger substantive free and appropriate public education issue (the proposed individualized education plan of November 2002). The district court did not abuse its discretion by determining the Appellants' relief as de minimis. See *Shapiro, 374 F.3d at 865* (citing *Parents of Student W., 31 F.3d at 1498*). Though the district court

> might have been within its discretion to award Appellants attorney's fees, we cannot say the district court abused its discretion in not awarding fees. *Id.* at 1157.

Unlike the Seventh and the Ninth Circuits, the Third Circuit did not at all defer to the District Court's discretion. Instead, it utilized its own notion that $425 is not *de minimis*. Nor did it recognize, as did the Seventh, that the child was awarded no new or additional services.[2] The chasm between what the Third Circuit did and the analysis employed by the Seventh and the Ninth Circuits is a broad one that calls for this Court to step in and determine what the standard ought to be under the IDEA.

[2] See Appendix A at p. 16a.

CONCLUSION

Certiorari is warranted to resolve splits among the circuits on two important issues - 1) what constitutes judicial imprimatur sufficient to satisfy *Buckhannon*?; 2) what is the level of relief under the IDEA that satisfies the standard set by this Court in *Farrar*?

Respectfully submitted,

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Dated: June 28, 2006

Appendix A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 04-4705

P. N., an infant. individually and by
his parent and legal guardian, M. W. ,
Appellants

v.

CLEMENTON BOARD OF EDUCATION

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 02-cv-01351)
District Judge Honorable Freda L. Wolfson

Argued December 12, 2005

Before: SLOVITER, SMITH, and STAPLETON,
Circuit Judges.

(Filed April 5: 2006)

Jamie Epstein (Argued)
Cherry Hill, N.J. 08002

Attorney for Appellant

James F. Schwerin (Argued)
Parker, McCay & Criscuolo
Lawrenceville, N.J. 08648

Attorney for Appellee

OPINION OF THE COURT

SLOVITER, Circuit Judge.

Section 615(i)(3)(B) of the Individuals with Disability Education Act ("IDEA") provides: "In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents of a child with a disability who is the prevailing party." 20 U.S.C. § 1415(i)(3)(B). Plaintiffs-Appellants P.N. and his guardian M.W. (collectively "plaintiffs") appeal from the District Court's Order denying their motion for prevailing party attorneys' fees and granting summary judgment to defendant Clementon Board of Education.

I.

P.N. was born in 1988 and suffers from Attention Deficit Hyperactivity Disorder. During the 2000-01 school year, the Clementon Board of Education ("CBE") expelled P.N. after-he sent a note threatening to blow up his school. P.N, was homeschooled for the rest of the year, but was permitted to return to school for the 2001-02 year. P.N. did not repeat that threat but CBE again suspended him during the 2001-02 school year for disruptive behavior. The parties dispute the specific conduct that resulted in this suspension.

Plaintiffs filed a petition for a due process hearing on October 25, 2001.[1] The petition sought the following

[1] It is unclear whether CBE ever filed a cross-petition for a due process hearing. CBE claims to have filed such a petition, Appellee's Br. at 2, but at oral argument, counsel for plaintiffs stated that the school did not file a cross-petition for a due process hearing and counsel for CBE did not contest this statement. The only petition for due process present in the

(footnote continues)

relief: that P.N. be returned to school, that P.N. be reimbursed for the cost of all psychological services received by P.N. since being required to receive such services by CBE,[2] that a § 504 plan under the Rehabilitation Act of 1973 be prepared by CBE,[3] and that P.N. be evaluated by an independent child study team.

The parties settled the underlying dispute before a due process hearing took place, and the Administrative Law Judge (ALJ) entered two consent orders. The first one, dated November 1, 2001, ordered:

> 1. On 11/5/01, C.S.D.[4] shall return P.N. to his current placement that was in place prior to his removal on 10/16/01.

(footnote continued)

record is P. N.'s . The November 1 consent decree refers only to the "petition for emergent relief filed on 10/25/01 with the Office of Special Education of the New Jersey Department of Education by Jamie Epstein, Esquire for Petitioner, with Frank Cavallo, Esquire, for respondent, having consented to the following relief." App. at 25.

[2] CBE required that P.N. see a psychologist after his first expulsion from school.

[3] Section 504 of the Rehabilitation Act of 1973 is codified at 29 U.S.C. § 794(a) and provides:

> No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely be reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

[4] "C.S.D." refers to Clementon School District.

2. On 11/5/01, C.S.D. shall provide P.N. with appropriate accommodation in regards [to] any behaviors which may interfere with P.N.'s ability to receive an education. Dr. Paul Booker may provide assistance in the development of said accommodation.[5] If such assistance is provided, on the return date, this forum shall determine if C.S.D should reimburse petitioners for Dr. Booker's fees.

3. P.N is to receive an Independent Child Study Team Evaluation in accordance with the procedures outlined in N.J.A.C 1:6A-14.3. at C.S.D's expense. The Social Work evaluation shall be performed by C.S.D. The psychiatric evaluation shall be performed by Dr. Raymond H. Schweibert, M.D. If counsel cannot agree on who will do the learning and school psychology evaluations by 11/7/01, each shall submit three names for each evaluation to this forum with the right to object to one of the three proposed evaluators for each evaluation.

4. C.S.D. shall provide petitioners transportation to and from all evaluations.

5. This matter shall reconvene on 12/5/01 before the undersigned A.L.J.

6. This decision is final pursuant to 20 *U.S.C.A.* § 1415(i)(1)(A) and 34 *C.F.R.* § 300.510 (1999). If either party feels that this decision is not being fully implemented, this concern should be communicated in writing to the Director, Office of Special Education Programs.

---

[5] Dr. Booker is a private mental health professional seen by P.N.

App. at 25-26 (emphasis in original)

The second Consent Order, dated February 13, 2002, stated that the parties "agreed to a resolution of all remaining issues" and ordered:

> 1. Respondent [C.S.D.] will pay the parents in the amount of $425.00 in satisfaction of petitioners' claims for reimbursement for the costs of psychological treatment and psychiatric services to date, said payment to be made no later than March 25, 2002.
>
> 2. Respondents will pay the reasonable costs of attendance at the IEP [Individualized Education Program] meeting of psychologist Paul Booker, . . . said meeting to be scheduled on a date as soon as possible, convenient to all participants, including Dr. Booker, said payment to be made no later than 30 days after said meeting.
>
> 3. The remaining claims raised in the petition of appeal and subsequent amendments, including petitioners' allegations that the respondent violated their rights to timely receipt of student records, are dismissed.
>
> 4. The issue of counsel fees is reserved for decision by a court of competent jurisdiction or for amicable resolution between the parties.
>
> 5. This decision is final pursuant to 20 *U.S.C.A.* § 1415(i)(1)(A) and 34 *C.F.R.* 300.10(1999).

App. at 27-28.

On March 26, 2002, plaintiffs filed a complaint in the United States District Court for the District of New Jersey setting forth the background and the

history of the consent orders and seeking prevailing party attorneys' fees and costs pursuant to the IDEA. CBE responded, inter alia, that plaintiffs are not prevailing parties under the provisions of the IDEA. In July 2002, P.N. and his parents filed a motion to enforce that part of the ALJ Order of February 13, 2002, requiring CBE to pay P.N. $425.00, as well as for statutory interest, attorneys' fees, and costs incurred in enforcing the Order. On October 31, 2002, the District Court issued an opinion denying plaintiffs' motion for $425.00 and costs. The case was then reassigned to another District Judge on March 13, 2003 and marked closed by the clerk of the court. On June 15, 2004 the District Court granted plaintiffs' motion to reopen. Shortly thereafter, plaintiffs filed their motion for prevailing party attorneys' fees. CBE filed a cross-motion for summary judgment.

The District Court granted CBE's motion for summary judgment and denied plaintiffs' motion for attorneys' fees, holding that although the consent orders entered in favor of plaintiffs did not "preclude Plaintiff from being a prevailing party," App. at 10, plaintiffs' success was de minimnis and they were therefore not entitled to attorneys' fees. The District Court stated that obtaining an IEP, an order for reimbursement of psychological services in the amount of $425.00, reinstatement in school, and an evaluation by an independent child study team did not constitute a "substantial victory." App. at 13. In addition, the District Court stated that "Plaintiffs did not prevail beyond the basic requirements of the IDEA and N.J.A.C. 1:6A-14.4, and cannot be considered a prevailing party because of their failure to achieve any relief on the merits of their claim that materially altered their legal relationship with CBE. Thus, an award of attorney[s'] fees is

inappropriate." App. at 13-14.

Plaintiffs appeal from the District Court's order granting summary judgment to CBE. Plaintiffs contend that the consent orders entered by the ALJ rendered them the prevailing party and that their success was significant. In response, CBE contends that pursuant to the Supreme Court's decision in *Buckhannon Bd. v. West Virginia D.H.H.R.*, 532-U.S. 598 (2001), attorneys' fees cannot be granted for settlements entered into in the course of administrative proceedings. CBE further contends that even if attorneys' fees can be recovered for consent orders entered into pursuant to administrative proceedings, the District Court correctly found that plaintiffs had only de minimis success in this case.

II.

This court has jurisdiction pursuant to 28 U.S.C. § 1291. We review a grant of summary judgment de novo, applying the same standard as did the district court. *Antonelli v. New Jersey*, 419 F.3d 267, 272 (3d Cir. 2005). In reviewing the grant of summary judgment, we must view the underlying facts and all reasonable inferences therefrom in the light most favorable to the party opposing the motion. *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 357 (3d Cir. 2004). Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56.

This court reviews the District Court's denial of attorneys' fees for abuse of discretion. *Pierce v. Underwood*, 487 U.S. 552, 559 (1988); *Morgan v. Perry*, 142 F.3d 670, 682-83 (3d Cir. 1988). An abuse of

discretion occurs when a district court's decision "rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact." *Hanover Potato Products, Inc. v. Shalala*, 989 F.2d 123, 127 (3d Cir. 1993) (quotation marks and citations omitted). However, if the District Court denied the fees based on its conclusions on questions of law, our review is plenary. *Washington v. Heckler*, 756 F.2d 959, 962 (3d Cir. 1986).

III.

A. The *Buckhannon* Standard

Under the "American Rule," parties are typically responsible for their own attorneys' fees. See *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). As noted above, however, the IDEA, 20 U.S.C. § 1440, et seq., contains a specific provision authorizing an order for such fees as "part of the costs to the parents of a child with a disability who is the prevailing party." *J.O. ex rel. C.O. v. Orange Tp. Bd. of Educ.*, 287 F.3d 267, 271 (3d Cir. 2002) (citing 20 U.S.C. § 1415(i)(3)(B)).

In *Buckhannon Bd. v. West Virginia D.H.H.R.*, the Supreme Court clarified its interpretation of the term "prevailing party," 532 U.S. at 605. The Court held that in order to be a "prevailing party," a party must be "successful" in the sense that it has been awarded some relief by a court. *Id.* at 603. The Court noted that this concept of "success," however, is not inconsistent with a defendant's voluntary compliance. The Court acknowledged that a party benefitting from a settlement agreement, for example, could be a "prevailing party," provided the "change in the legal relationship of the parties" was in some way "judicially sanctioned." *Id.* at 605; *see also John T. ex rel. Paul T.*

v. Delaware County Intermediate Unit, 318 F.3d 545, 556 (3d Cir. 2003).

This court has held that *Buckhannon* applies to the fee-shifting provision of the IDEA. *See John T.*, 318 F.3d at 556 (holding that "*Buckhannon* applies to attorney[s'] fee clams brought under the IDEA fee-shifting provision"). In interpreting *Buckhannon*, we have stated that "a *stipulated settlement* could confer prevailing party status under certain circumstances," *John T.*, 318 F.3d at 558 (emphasis in original); namely, where it alters the legal relationship of the parents and is judicially sanctioned. A stipulated settlement is judicially sanctioned where it: 1) contains mandatory language; 2) is entitled "Order," 3) bears the signature of the District Court judge: not the parties' counsel; and 4) provides for judicial enforcement. *Id.* (citing *Truesdell v. Phila. Hous. Auth.*, 290 F.3d 159 (3d Cir. 2002)); *see also Preservation Coalition v. Federal Transit Admin.*, 356 F.3d 444, 452 (2d Cir. 2004) (holding that *Buckhannon* does not limit fee awards to enforceable judgments on the merits and consent decrees); *Christina A. v. Bloomberg*, 315 F.3d 990, 993 (8th Cir. 2003) (holding that a court-approved settlement was not enforceable by the court absent a new action for breach of contract and therefore plaintiffs were not prevailing parties).

The District Court found that the consent decrees at issue here met the requirements set forth in *John T.* and *Truesdell*. The District Court noted that the Consent Order entered on February 12 "(1) contain[ed] mandatory language stating that [CBE] 'will' do certain things, (2) was entitled 'Consent Order,' (3) bore the signature of the ALJ, and (4) is enforceable under § 1983 and in state court." App. at 10.

CBE contends that to constitute a decree under *Buckhannon*, a court must retain jurisdiction to enforce the settlement and have the power to issue a citation for contempt for non-compliance. It argues that because the ALJ here did not and could not[6] retain jurisdiction to enforce its consent orders in accordance with *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S., 375 (1994), these orders lacked the judicial imprimatur required by *Buckhannon* to confer prevailing party status.

The Supreme Court had previously considered whether a court maintains jurisdiction to enforce a settlement agreement when it does no more than "so order" a stipulation and order of dismissal that dismisses the complaint after settlement without reference to the settlement agreement. *Id.* The Court held that there was no jurisdiction, but noted that:

> [t]he situation would be quite different if the parties' obligation to comply with the terms or the settlement agreement had been made part of the order of dismissal. . . . In that event, a breach of the agreement would be a violation of the order and jurisdiction to enforce the agreement would therefore exist.

Id. at 38. *Kokkonen* suggests settlement of an administrative proceeding is the equivalent of an

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[6]*See, e.g. Bellesfield v. Bd. of Educ. of Randolph*, 96 N.J.A.R. (EDU) 35 (N.J. Adm. 1995) ("Administrative Agencies only have those powers specifically granted either expressly or by implication. An Administrative Officer is a creation of Legislation who must act only within the bounds of the authority delegated to him. . . . [and] does not have the power and is not the appropriate forum . . . for enforcement.")(citations and quotation marks omitted).

administrative decree on the merits where, as here, the parties' obligation to comply with the terms of the settlement agreement has been made part of the order of dismissal. *See A.R. ex rel. R.V. v. New York City Dept. of Educ.*, 407 F.3d 65 (2d Cir. 2005).

The Court of Appeals for the Second Circuit has convincingly addressed and rejected an argument similar to the one that CBE makes here. In *A.R.*, the parents of disabled children instituted four separate New York State administrative proceedings challenging, under the IDEA, the special educational programs that the New York City Department of Education had provided for disabled children. In two of the four proceedings: impartial hearing officers entered decisions for the plaintiffs on the merits. In the two others, impartial hearing officers issued "Statements of Agreement and Order" that recorded the terms of settlement agreements between the parties. The plaintiffs then sought attorneys' fees. The Court of Appeals held that IDEA administrative decisions may, in certain circumstances, confer prevailing party status. It noted that although an administrative decision on the merits in an IDEA case does not have judicial imprimatur, it has administrative imprimatur:

> Its terms are enforceable, if not by the IHO itself,[7] then by a court, including through an action under 42 U.S.C. § 1983. . . . [W]e conclude that the combination of administrative *imprimatur*, the change in the legal relationship of the parties arising from it, and subsequent judicial enforceability, render such

[7]IHOs are Impartial Hearing Officers who are appointed by the local board of education.

> a winning party a 'prevailing party' under *Buckhannon's* principles.

A.R., 407 F.3d at 76 (emphasis in original).

The Second Circuit specifically rejected the argument made by the Board of Education there, similar to that made by CBE here, that plaintiffs "cannot be 'prevailing parties' because the IHOs conducting their hearings lacked jurisdiction to enforce the terms of the settlement agreements . . . . Under our analysis, the fact that the IHOs, as is common in administrative procedures, have no enforcement mechanism . . . is irrelevant, at least so long as judicial enforcement is available." We are persuaded by the analysis in *A.R.*

CBE argues that because N.J. Admin. Code § 1:1-19.1 (2006) mandates review of settlements by an ALJ, the ALJ's signature here does not provide the required judicial imprimatur; it simply attests to the fact that the Orders were not contrary to law. CBE cites to *Christina A. v. Bloomberg*, 315 F.3d 990 (8th Cir.2003), in support of this proposition, In *Christina A.*, the plaintiffs, inmates at a training school who had challenged the education being provided, obtained a hearing and approval of a settlement pursuant to Fed. R. Civ. P. 23(e), which requires that "[t]he court must approve any settlement . . . of a certified class." The Eighth Circuit held that they were not prevailing parties for purposes of fees because this type of agreement is not enforceable by a court absent a separate breach of contract action, and therefore, does not bear the necessary judicial imprimatur.

As is clear from *A.R.*, a settlement of administrative proceedings that is judicially enforceable meets the *Buckhannon* requirements.

Because the consent orders entered here were enforceable through an action under 28 U.S.C. § 1983 and under state law, these consent orders, unlike those in *Christina A.*, satisfy *Buckhannon*.

B. Prevailing Party Status

We turn to the basis on which the District Court denied plaintiffs' motion for attorneys' fees: its conclusion that plaintiffs "cannot be considered [ ] prevailing part[ies] because of their failure to achieve any relief on the merits of their claim that materially altered their legal relationship with CBE." App. at 13. The Supreme Court has rendered a number of decisions on this issue. In *Farrar v. Hobby*, the Court held that "a plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." 506 U.S. 103, 111-12 (1992) "[P]laintiffs may be considered 'prevailing parties' for attorney[s'] fees purposes if they succeed on any *significant* issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (emphasis added) (quotation marks and citation omitted). Thereafter, the Court stated that, to succeed, "at a minimum, . . . the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant." *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989).

We summarized our review of the applicable legal principles in *Ridgewood Bd. of Educ. V. M.E.*, where we held that a resolution "materially alters the legal relationship between the parties" when it "modif[ies] the defendant's behavior in a way that directly

benefits the plaintiff." 172 F.3d 238, 251 (3d Cir. 1999) (citations and quotation marks omitted).

The Supreme Court noted that certain victories may be "technical or de minimis" but characterized its approach as adopting a "generous formulation" of "prevailing party" status. *See Texas State Teachers*, 484, U.S. 792; *J.O.*, 287 F.3d at 271. In a later case, the Court clarified the distinction that exists between the issue of plaintiff's eligibility for an attorney's fee award and the amount of the attorney's fee that should be awarded.

In *Farrar*, the Court first explained the meaning of "technical" victory by providing the following example:

> In [*Texas State Teachers*], the District Court declared unconstitutionally vague a regulation requiring that "nonschool hour meetings be conducted only with prior approval from the local school principal." . . . [T]his finding alone would not sustain prevailing party status if there were "'no evidence that the plaintiffs were ever refused permission to use school premises during non-school hours.'" . . . Despite winning a declaratory judgment, the plaintiff's could not alter the defendant school board's behavior toward them for their benefit.

Farrar, 506 U.S. at 113 The Court then stated:

> Now that we are confronted with the question whether a nominal damages award is the sort of "technical," "insignificant" victory that cannot confer prevailing party status, we hold that the prevailing party inquiry does not turn on the magnitude of the relief obtained. We recognized as much in *Garland* when we noted

> that "the degree of the plaintiff's success" does not affect of the plaintiff's "eligibility for a fee award."
>
> Although the "technical" nature of a nominal damages or any other judgment does not affect the prevailing party inquiry, it does bear on the propriety of fees awarded under § 1988.

Farrar, 506 U.S. at 113-14 (emphasis in original; citations omitted).

The District Court's finding that plaintiffs' success was not "substantial" is largely irrelevant to a determination of whether or not they were prevailing parties, "'[T]he degree of the plaintiff's overall success goes to the reasonableness of the award under *Hensley*, not to the availability of a fee award *vel non*.'" *Truesdell*, 290 F.3d at 166 (3d Cir. 2002) (quoting *Texas State Teachers*, 489 U.S. at 782). The relevant inquiry is whether plaintiffs' success was significant. Regardless of how substantial their success, if plaintiffs succeeded on a significant issue they are entitled to prevailing party status.

Plaintiff's here received all that they sought. Specifically, they sought that P.N. be returned to school immediately, that CBE reimburse them for the cost of all psychological services received by P.N., that CBE hold a meeting to develop a section 504 accommodation plan for P.N., that CBE pay for P.N.'s psychologist to participate in said meeting, and that the child study team evaluation requested by the school be performed by an independent child study team.

Plaintiffs obtained orders from the ALJ requiring that each of these demands be met. The Orders

benefitted P.N. and forced CBE to change its behavior, thus altering their legal relationship. As such, the Orders meet the standards enunciated by the Supreme Court.

The District Court's conclusion that the plaintiffs' failure to "prevail beyond the basic requirements of the IDEA," App. at 13, and achieve substantial relief precluded them from prevailing party status is perplexing. The purpose of the fee provision in IDEA is to enable parents or guardians of disabled children for whom the statute was enacted to effectuate the rights provided by the statute. To suggest, as CBE does, that plaintiffs must establish a new right or expand the requirements of the IDEA in order to obtain attorneys' fees is to ignore the Supreme Court's "generous formulation" of the term "prevailing party." *Texas State Teachers*, 489 U.S. at 792. As required by the Supreme Court's interpretation of "prevailing party," discussed supra, the Orders altered the legal relationship between the parties by compelling the school to reinstate P.N. and by forcing CBE to act in accordance with the IDEA.

CBE contends that the relief obtained in this case is identical to the relief obtained in *J.O.*, 287 F.3d at 267, where the plaintiff was denied attorneys' fees. The cases are distinguishable. In *J.O.*, this court held that a party cannot be a prevailing party if it receives interim relief that is not merit-based. The plaintiff in *J.O.* filed suit for attorneys' fees after an ALJ granted her request that her child, C.O., be reinstated in the public high school. The ALJ's order to reinstate C.O. in school "[was] effective only until an appropriate placement could be found for C.0. or until a 'further Order of an [ALJ], or until the issuance of a final decision in this matter.'" *J.O.*, 287 F.3d at 274. This

court characterized the reinstatement as a "stay-put" order to maintain the status quo that would have no effect on C.O.'s further educational placement, rather than a determination of the merits of the case. Thus, the order did not render the plaintiffs the prevailing party.

CBE argues that, like C.O., P.N. was returned to his previous placement in high school. This argument is unavailing, however, because, unlike the order in *J.O.*, there is no indication that the Orders at issue here are temporary stay-put orders. The Orders do not state that P.N.'s reinstatement is pending a further hearing or proceeding, or that the reinstatement will end on any particular date. Rather, the Orders unconditionally require his reinstatement in school. Moreover, plaintiffs were successful on other fronts. As noted above, they received, inter alia, reimbursement for psychological services and an evaluation by an independent child study team rather than the CBE's child study team, as CBE wanted.

CBE also contends that insofar as P.N. obtained an IEP, this was only a de minimis victory. CBE cites to *John T.*, 318 F.3d at 545, for the proposition that obtaining an IEP does not give a plaintiff prevailing party status. Once again, the cases are not comparable. In *John T.*, we held that plaintiffs who had obtained an acceptable IEP were not entitled to prevailing party status only because the IEP was achieved through private negotiation. We stated, "Although John T. undoubtedly realized an objective of his litigation upon obtaining an acceptable IEP which placed him in public schools, this result was not 'judicially sanctioned' as required by *Buckhannon*, John T. and [the defendant] developed the IEP through negotiations out of court." *Id.* at 560. We did

not hold, as CBE contends, that securing an IEP is insufficient to obtain prevailing party status. Our analysis focused only on the fact that the IEP was achieved through "negotiations out of court." 318 F.3d at 560.[8]

Because plaintiffs are prevailing parties who have achieved success on significant issues, we will reverse the District Court's Order granting summary judgment to CBO, and remand this case to that court with instructions to award reasonable attorneys' fees to plaintiffs.

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[8]The District Court's conclusion that the ALJ's order requiring reimbursement of P.N. for $425 in psychologist's fees was a de minimis recovery that could not make P.N. a "prevailing party" is particularly troubling for two reasons. First, as we have pointed out, there is no de minimis exception to the rule that a plaintiff "prevails" whenever- "relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that benefits the plaintiff." *Farrar*, 506 U.S. at 111-12. - See p. ___, infra. In *Farrar*, for example, the Supreme Court found a plaintiff who received $1 in nominal damages to be a prevailing party. Second, even when considered for the purpose of determining the amount of attorneys' fees to be awarded, an award of $425 in the context of the IDEA can hardly be regarded as de minimis. As Amici point out, IDEA claims often involve low income families raising handicapped or otherwise troubled children receiving some kind of public assistance. See Br. Amici Curiae of Nonprofit Educational Organizations at 19. Indeed, we believe the IDEA's fee shifting provision is specifically designed to protect those families for whom $425 is not a de minimis amount of money.

Appendix B

NOT FOR PUBLICATION **[18, 19]**

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

P.N., *an infant, individually and by his parent and legal guardian*, M.W.,	:	Civil Action No. 02-1351 (FLW)
Plaintiffs,	:	**OPINION**
v.	:	
Clementon Board of Education,	:	
Defendant.	:	
	:	

APPEARANCES:

For Plaintiff:

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WOLFSON, United States District Judge

This matter comes before the Court upon Plaintiffs' motion for prevailing party attorney's fees and costs for administrative proceedings conducted under the Individuals with Disability Education Act ("IDEA"), and Defendant Clementon Board of Education's ("CBE" or "Defendant") cross-motion for summary judgment. Plaintiffs, P.N., a disabled infant, and N.W., his parent and legal guardian, are seeking attorney's fees pursuant to 20 U.S.C. § 1415(i)(3)(B). This Court has jurisdiction pursuant to 28 U.S.C. § 1331. For the reasons set forth below, Plaintiff's motion for attorney's fees is denied and Defendant's motion for summary judgment is granted.

I. BACKGROUND

Plaintiff P.N. was born in 1988 and suffers from Attention Deficit Hyperactivity Disorder ("ADHD"). In the 2000-01 school year, P.N. threatened to blow up his school. P.N. was homeschooled for the remainder of the 2000-01 school year, but Defendant allowed him to return to school for the 2001-02 term. In the 2001-02 school year, CBE again suspended P.N. on October 16, 2001, although the parties dispute the specific conduct for which P.N. was punished.[1]

P.N.'s parents and CBE both filed for due process hearings. The parental petition sought the following relief: that P.N. be returned to school, that he receive unspecified accommodations, that a §504 plan under the Rehabilitation Act of 1973 be prepared and that

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[1] Defendant asserts that P.N. wrote a threatening note to a teacher; Plaintiff states that P.N. pushed and knocked over two girls in the hallway.

P.N. be evaluated. Plaintiffs' petition also asserted that CBE had failed to provide records. CBE's petition sought to compel an evaluation of P.N.

The parties settled before any hearing took place, and Administrative Law Judge M. Kathleen Duncan ("the ALJ") entered two consent orders. The first one, dated November 1, 2001, orders:

> 1. On 11/5/01, C.S.D. shall return P.N. to his current placement that was in place prior to his removal on 10/16/01.
>
> 2. On 11/5/01, C.S.D. shall provide P.N. with appropriate accommodation in regards [to] any behaviors which may interfere with P.N.'s ability to receive an education. Dr. Paul Booker may provide assistance in the development of said accommodation. If such assistance is provided, on the return date, this forum shall determine if C.S.D. should reimburse petitioners for Dr. Booker's fees.
>
> 3. P.N. is to receive an Independent Child Study Team Evaluation in accordance with the procedures outlined in N.J.A.C. 1:6A-1.4.3 at C.S.D.'s expense. The Social Work evaluation shall be performed by C.S.D. The psychiatric evaluation shall be performed by Dr. Raymond H. Schwaibert, M.D. If counsel cannot agree on who will do the learning and school psychology evaluations by 11/7/01, each shall submit three names for each evaluation in this forum with the right to object to one of the three proposed evaluators for each evaluation. The forum shall then notify counsel of which evaluators are selected. It is desired for all evaluations to completed within 30 days of the date of this

Order.

4. C.S.D. shall provide petitioners transportation to and from all evaluations.

5. This matter shall reconvene on 12/5/01 before the undersigned A.L.J.

6. This decision is final pursuant to 20 U.S.C.A. § 1415(i)(1)(A) and 34 C.F.R. § 300.10 (1999). If either party feels that this decision is not being fully implemented, this concern should be communicated in writing to the Director, Office of Special Education Programs.

The second Consent Order, dated February 13, 2002, states that "the parties now having agreed to a resolution of all remaining issues," and orders:

1. Respondent will pay the parents in the amount of $425.00 in satisfaction of petitioners' claims for reimbursement for the costs of psychological treatment and psychiatric services to date, said payment to be made no later than March 25, 2002.

2. Respondents will pay the reasonable costs of attendance at the IEP meeting of psychologist Paul Booker, Ed. D., said meeting to be scheduled on a date as soon as possible, convenient to all participants, including Dr. Booker, said payment to be made no later than 30 days after said meeting.

3. The remaining claims raised in the petition of appeal and subsequent amendments, including petitioners' allegations that the respondent violated their rights to timely receipt of student records, are dismissed.

> 4. The issue of counsel fees is reserved for a decision by a court of competent jurisdiction or for amicable resolution between the parties.
>
> 5. This decision is final pursuant to 20 U.S.C.A. § 1415(i)(1)(A) and 34 C.F.R. § 300.10 (1999). If either party feels that this decision is not being fully implemented, this concern should be communicated in writing to the Director, Office of Special Education Programs.

Plaintiffs filed their Complaint for prevailing party fees and costs on March 26, 2002. CBE filed its Answer on April 10, 2002. On July 15, 2002, Plaintiffs filed a motion for an order to enforce that part of the ALJ Order of February 13, 2002 requiring Defendant to pay to Plaintiffs $425.00 and for statutory interest, attorney fees and costs incurred in enforcing said Order. On October 31, 2002, Judge Simandle issued an Opinion denying Plaintiffs' motion. The case was reassigned to this Court on January 8, 2003. The Clerk marked the case "Closed" on March 13, 2003. On December 23, 2003, Plaintiffs filed a motion to reopen the case to determine whether Plaintiffs' attorney's fees should be ordered paid, and the Court granted the motion to reopen on June 15, 2004.

On July 16, 2004, Plaintiffs filed their motion for attorney's fees. CBE filed its cross-motion for summary judgment on July 28, 2004. Plaintiffs filed a reply/opposition brief on August 6, 2004, and CBE filed a reply on August 12, 2004.

II. DISCUSSION

A. Summary Judgment Standard

Summary judgment is appropriate where there is no genuine issue as to any material fact and the

moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). To avoid summary judgment the non-moving party must "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex Corp.*, 477 U.S. at 324. A genuine issue of material fact is one that will permit a reasonable jury to return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In evaluating the evidence, the Court must "view the inferences to be drawn from the underlying facts in the light most favorable to the [nonmoving] party." *Curley v. Klem*, 298 F.3d 271, 276-77 (3d Cir. 2002) (quoting *Bartnicki v. Vopper*, 200 F.3d 109, 114 (3d Cir. 1999)). Conclusory allegations do not meet the non-moving party's duty to set forth specific facts showing that a genuine issue of material fact exists and a reasonable factfinder could rule in its favor. *Ridgewood Bd. of Ed. v. Stokley*, 172 F.3d 238, 252 (3d Cir. 1999).

B. The IDEA

The IDEA provides federal money to assist states and local agencies in educating handicapped children. *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 179 (1982). Congress has stated that the purpose of the IDEA is:

> to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living; to ensure that the

> rights of children with disabilities and parents of such children are protected; and to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities; to assist States in the implementation of a statewide, comprehensive, coordinated, multidisciplinary, interagency system of early intervention services for infants and toddlers with disabilities and their families; to ensure that educators and parents have the necessary tools to improve educational results for children with disabilities by supporting systemic-change activities; coordinated research and personnel preparation; coordinated technical assistance, dissemination, and support; and technology development and media services; and to assess, and ensure the effectiveness of, efforts to educate children with disabilities. 20 U.S.C. § 1400(d)(1)-(4).

Under the IDEA, states are required to establish certain procedural safeguards for children with disabilities, including allowing parents who object to their child's Individualized Education Program ("IEP") to obtain an impartial due process hearing. *E.M. v. Millville Bd. of Educ.*, 849 F. Supp. 312, 314 (D.N.J.1994) (citing 20 U.S.C. § 1415). At this hearing, the parents are to be given the "opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child." 20 U.S.C. § 1415(b)(6).

Receipt of IDEA funds is conditioned on a participating state's compliance with the IDEA's goals and requirements. *Lascari v. Bd. of Educ., Ramapo Indian Hills Reg'l Sch. Dist.*, 116 N.J. 30, 33-34 (1989);

see also Hendrick Hudson Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 180-81 (1982). New Jersey has elected to participate in the federal program. As such, it has enacted legislation, N.J.S.A. 18A:46-1 to -46, and adopted regulations, N.J.A.C. 6:28-1.1 to -12.1, that assure all handicapped children the right to a free appropriate public education ("FAPE") as required by the IDEA. N.J.A.C. 6:28-1.1(b)(1). Under the New Jersey regulations, when parents of a handicapped child are dissatisfied with his or her education, they have the right to request a mediation conference, N.J.A.C. 6:28-2.6, or to request a due-process hearing, N.J.A.C. 6:28- 2.7.

C. Attorney's Fees

Under the "American Rule," parties typically are responsible for their own attorney's fees. *See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975). Given this rule, courts follow "a general practice of not awarding fees to a prevailing party absent explicit statutory authority." *Key Tronic Corp. v. United States*, 511 U.S. 809, 819 (1994). However, the fee-shifting provision of the IDEA does provide such explicit statutory authority. Section 1415(i)(3)(B) states: "In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents of a child with a disability who is the prevailing party."

Recently, the Supreme Court further clarified its understanding of the term "prevailing party." *In Buckhannon Bd. and Care Home v. West Viriginia Dep't. of Health and Human Res.*, 532 U.S. 598 (2001), the Supreme Court held that a litigant whose FFHA and ADA actions were mooted by intervening state

legislation was not a "prevailing party" for purposes of the FFHA and ADA fee-shifting provisions. Although the *Buckhannon* Court recognized that the plaintiff's suit might have been a "catalyst" of the defendant's voluntary, legislative change, it held that the so-called "catalyst theory" was an insufficient basis on which to confer "prevailing party" status. *Id.* at 602. Therefore, while the legislative change indisputably altered the legal relationship of the parties, it lacked an essential feature—namely, a "judicial imprimatur." *Id.* at 605 (emphasis omitted).

The *Buckhannon* Court concluded that in order to be a "prevailing party," a party must be "successful" in the sense that it has been awarded some relief by a court. *Id.* at 603-04. This concept of "success," however, is not inconsistent with a defendant's concession or voluntary compliance. The Court acknowledged that a party benefitting from a settlement agreement, for example, could be a "prevailing party," provided the "change in the legal relationship of the parties" was in some way "judicially sanctioned." *Id.* at 605. The Supreme Court then reconciled this rule with its previous holdings, noting that it had "only awarded attorney's fees where the plaintiff ha[d] received a judgment on the merits ... or obtained a court-ordered consent decree." 532 U.S. at 605. Subsequent decisions, both in this Circuit and in other circuits, have found the *Buckhannon* opinion fully applicable to IDEA cases. *See John T. ex rel. Paul T. v. Delaware County Intermediate*, 318 F.3d 545, 558 (3d Cir. 2003); *G. V. Fort Bragg Dependent Schs.*, 343 F.3d 295, 310 (4th Cir. 2003); *J.C. v. Regional Sch. Dist. 10, Bd. of Educ.*, 278 F.3d 119, 125 (2d Cir. 2002); *T.D. v. LaGrange Sch. Dist. No. 102*, 349 F.3d 469, 482 (7th Cir. 2003); *Doe v. Boston Pub. Schs.*, 358 F.3d 20, 26

(1st Cir. 2004).

In *J.O. v. Orange Twp. Bd. of Educ.*, 287 F.3d 267 (3d Cir.2002), the Third Circuit considered whether an IDEA litigant who obtained a stay-put order was a "prevailing party" for purposes of the IDEA fee-shifting provision. Noting that stay-put orders function "in essence as an automatic preliminary injunction" to maintain the status quo during the pendency of proceedings, the court focused on the interim nature of the relief. *Id.* at 272 (quoting *Drinker v. Colonial Sch. Dist.*, 78 F.3d 859, 864 (3d Cir.1996)). Although the court recognized the importance of the interim relief that the IDEA provides, it held that such relief could only form the basis of an attorney's fee award if it was in some way "merit-based." *Id.* at 273-74. Because the interim relief obtained in *J.O.* did not involve a resolution on the merits of a claim, the Third Circuit held that J.O. was not a prevailing party. *See id.*

While the *J.O.* decision was decided on an independent basis and without reference to *Buckhannon*, the Third Circuit ruled in *John T.* that *Buckhannon* controls the interpretation of "prevailing party" as it is used in § 1415(i)(3)(B). 318 F.3d at 558. In *John T.*, the court ruled that a prevailing party must have (1) received a judgment on the "merits" of the litigation, and not "interim relief" (2) obtained a court-ordered consent decree, or (3) entered into a stipulated settlement that is judicially sanctioned or endorsed with a "judicial imprimatur." *Id.*; *see Truesdell v. Phila. Hous. Auth.*, 290 F.3d 159, 165 (3d Cir. 2002) (finding that a stipulated settlement was "judicially sanctioned" under *Buckhannon* where it (1) contained mandatory language, (2) was entitled "Order," (3) bore the signature of the judge, not the

parties' counsel, and (4) provided for judicial enforcement).

1) Whether the Consent Orders Here Satisfy Buckhannon[2]

This Court must determine whether P.N. is a prevailing party to whom attorney's fees should be awarded. Defendant argues that because the ALJ declares in her second Consent Order that the proceedings are over, without retaining any jurisdiction to oversee compliance, the orders here are not judicially sanctioned and therefore do not satisfy *Buckhannon* and Plaintiff cannot be a prevailing party. However, Defendant's argument overlooks a crucial fact—that the Office of Administrative Law ("OAL") and Department of Education ("DOE") do not have the jurisdiction to enforce a settlement, even if the settlement is embodied in the order of an ALJ. *Bellefield v. Bd. of Educ. of the Township of Randolph*, 96 N.J. Admin. 2d 35 (1995), 1995 WL 814984 (N.J. Admin.); *In Re Jamesburg High Sch. Closing*, 83 N.J. 540, 549 (1980) ("An Administrative Officer is a creation of legislation who must act only within the bounds of the authority delegated to him [or her]."). Thus, the ALJ cannot retain power to enforce her orders. Yet, that cannot possibly mean that an ALJ order entered following a settlement between the parties can never confer prevailing status on a party because of the lack of enforcement power. That would turn the notion of achieving prevailing party status in

[2] The Court notes that the ALJ's final Order specifically reserved the issue of counsel fees "for a decision by a court of competent jurisdiction," and that this Order was entered after the Supreme Court's decision in Buckhannon.

an administrative proceeding conducted pursuant to the IDEA on its head. The case law certainly supports the concept of administrative success for prevailing party status. *See, e.g., Truesdell*, 290 F.3d 159. Therefore, further analysis of the enforcement concept in such administrative proceedings is necessary.

Notwithstanding the ALJ's lack of enforcement power, the Third Circuit has ruled that a Section 1983 action can be brought to enforce an IDEA administrative decision. *Jeremy H. by Hunter v. Mount Lebanon Sch. Dist.*, 95 F.3d 272, 279 (3d Cir. 1996); *W.B. v. Matula*, 67 F.3d 484, 493 (3d Cir. 1995); 42 U.S.C. § 1983. An action to enforce can also be filed in state court. *J.H.R. v. Bd. of Educ. of the Township of East Brunswick*, 705 A.2d 766, 777 (N.J. Super 1998). Therefore, because the second Consent Order here (1) contains mandatory language stating that Respondent "will" do certain things, (2) was entitled " Consent Order," (3) bore the signature of the ALJ, and (4) is enforceable under § 1983 and in state court, it is consistent with the *Buckhannon* holding and does not preclude Plaintiff from being a prevailing party.[3] But that does not end the inquiry.

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[3] Defendant directs this Court to Armstrong v. Vance, a case in which the District Court for the District of Columbia held that Buckhannon "precludes a fee award to those parties who settle their claims ... during the course of administrative proceedings and do not obtain a subsequent court order enforcing the settlement." 328 F. Supp.2d 50, 58 (D.D.C. 2004). Because the Consent Orders here are consistent with the holdings of the Supreme Court in Buckhannon and the Third Circuit in John T. and Truesdell, which are binding upon this Court, Armstrong is simply inapplicable here.

2) Whether Plaintiff's Success is De Minimis

Defendant also argues that Plaintiff is not entitled to an award of fees, even if the Consent Orders here satisfy the *Buckhannon* standards, because Plaintiff's success is de minimis. The Supreme Court has held that "plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir.1978)). Accordingly, "[t]he touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." *Texas State Teachers Ass'n v. Garland Independent Sch. Dist.*, 489 U.S. 782, 792-93 (1989).[4]

A party need not achieve all of the relief requested nor even ultimately win the case to be eligible for a fee award. "[A]s long as a plaintiff achieves some of the benefit sought in a lawsuit, even though the plaintiff does not ultimately succeed in securing a favorable judgment, the plaintiff can be considered the prevailing party for purposes of a fee award." *Id.* The relief need not be the exact relief requested as long as it goes toward achieving the same goal. To succeed, "at a minimum ... the plaintiff must be able to point to a resolution of the dispute which changes the legal

[4] Although Hensley and Texas State Teachers Ass'n. interpreted the fee-shifting provision of 42 U.S.C. § 1988, Hensley noted that its standards were "generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party.'" Hensley, 461 U.S. at 433 n. 7.

relationship between itself and the defendant." *Texas Teachers Ass'n.*, 489 U.S. at 792.

Although courts are to give a "generous formulation" to the term "prevailing party" under *Hensley*, such a term cannot be without bounds or it would quickly prove to be a meaningless basis on which to condition the recovery of attorneys' fees. *J.C. by J.C. v. Mendham Tp. Bd. of Educ.*, 29 F. Supp.2d 214, 219 (D.N.J. 1998). Accordingly, courts have limited the recovery of attorneys' fees to situations in which a party has prevailed in some way on the substantive merits of its claim. *Id.* The only clear exception to this "generous formulation" is where the plaintiff's success is purely technical, de minimis or a mere preservation of the status quo. *Id.* at 219-21; *Garland*, 489 U.S. at 792 ("Where the plaintiff's success on a legal claim can be characterized as purely technical or *de minimis*, a district court would be justified in concluding that even the 'generous formulation' we adopt today has not been satisfied."); *NAACP v. Wilmington Med. Ctr., Inc.*, 689 F.2d 1161, 1165 (3d Cir. 1982); *Swietlowich v. County of Bucks*, 620 F.2d 33, 34 (3d Cir. 1980) (a party does not prevail by winning procedural victories which leave the plaintiff "no closer to a verdict in [plaintiff's] favor than [plaintiff] was before").

Here, Defendant argues that the Consent Orders, which order that Defendant return P.N. to his previous placement, reimburse Plaintiffs in the amount of $425.00 for a psychologist, pay the reasonable costs of a psychologist's attendance at an IEP meeting and provide P.N. with an Independent Child Study Team Evaluation, do not establish Plaintiffs as prevailing parties because their success is merely de minimis. In fact, CBE's due process petition also sought to compel

an evaluation of P.N. Therefore, the Consent Orders, in part, granted to CBE exactly what it had wanted.

As to the remaining relief sought by Plaintiffs' due process petition, that P.N. should be returned to school, that he should receive unspecified accommodations, that a §504 plan under the Rehabilitation Act of 1973 should be prepared and that P should be evaluated, these areas also do not pass the test for prevailing party status for Plaintiffs.

While Plaintiffs argue that they substantially prevailed as a result of the Consent Orders, their success is more technical than substantive. In *John T.*, the Third Circuit ruled that the plaintiff was not a prevailing party solely by virtue of his having obtained an acceptable IEP pursuant to the IDEA. *John T.*, 318 F.3d at 560; *see J.C. v. Regional Sch. Dist. 10, Bd. of Educ.*, 278 F.3d at 125 (Second Circuit case stating that "[a]ny legal obligation to develop and implement an IEP arises from the IDEA's statutory mandate"). Moreover, the fact that the ALJ's second Order directs CBE to pay the reasonable costs of a psychologist's attendance at an IEP meeting and provide P.N. with an Independent Child Study Team Evaluation is hardly a substantial victory because N.J.A.C. 1:6A-14.4 (formerly N.J.A.C. 1:6A-14.3) directs "the board of education or public agency to pay for the independent educational evaluation at no cost to the parent[s]." Finally, the fact that CBE is to reimburse Plaintiffs in the amount of $425.00 for a psychologist is not a substantial victory.

Defendant also argues that the Third Circuit's decision in *J.O.* governs the situation here. In *J.O.*, the ALJ ordered that the plaintiff be reinstated to the public high school and evaluated, a behavioral

specialist be hired, and an IEP for the plaintiff be created. 287 F.3d at 271-72. Yet, the court denied an award of attorney's fees because it determined that the ALJ had not reached the merits of the parties' arguments because the relief awarded was analogous to the interim relief afforded by the IDEA's stay-put provision. *Id.* at 272-74. Plaintiffs argue that *J.O.* is inapplicable because the relief granted here is not interim; P.N. was permanently returned to school and the ALJ's second Consent Order states that it is a "final" decision. However, the Consent Orders also make clear that P.N. would be subject to an evaluation, thereby leaving the permanency of P.N.'s return to school still in issue.

In sum, Plaintiffs did not prevail beyond the basic requirements of the IDEA and N.J.A.C. 1:6A-14.4, and cannot be considered a prevailing party because of their failure to achieve any relief on the merits of their claim that materially altered their legal relationship with CBE. Thus, an award of attorney's fees is inappropriate and Defendant's motion for summary judgment is granted.

III. CONCLUSION

For the foregoing reasons, Plaintiff's motion for attorney's fees is denied and Defendant's motion for summary judgment is granted. The case shall be marked as closed.

/s/ Freda L. Wolfson

Honorable Freda L. Wolfson
United States District Judge

Dated: December 8 , 2004

Supreme Court, U.S.
FILED
AUG 25 2006
CLERK

No. 06-7

IN THE
Supreme Court of the United States

CLEMENTON BOARD OF EDUCATION,

Petitioner

v.

P.N., an infant, individually and by his parent, M.W.,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Whether the Petition should be denied because the Third Circuit's holding that the judicially enforceable final administrative consent orders convey "prevailing party" status under the Individuals with Disabilities Education Act is correct, is consistent with the decisions of this Court and does not conflict with the decisions of any other circuit court?

2. Whether the Petition should be denied because the Third Circuit's holding that Respondents were prevailing parties because they succeeded on all significant issues of the litigation is correct, is consistent with the decisions of this Court and does not conflict with the decisions of any other circuit court?

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COUNTER-STATEMENT OF THE CASE

Respondent P.N. incorporates by reference the facts set forth in the unanimous Third Circuit opinion. P.N. highlights the fact that, in Consent Orders signed by the Administrative Law Judge and incorporating the parties' settlement, he received all the relief and more that he requested from Petitioner Clementon Board of Education ("C.B.E.") in his petition for a due process hearing under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, et seq.

P.N. sought the following relief: a) immediate reinstatement to school; b) reimbursement for past mental health services; c) behavioral services; d) payment for his psychologist to assist in determining the behavioral services; and d) payment for him to be independently evaluated. Pet. App. 2a-3a.

P.N. obtained the following relief: a) immediate and unconditional reinstatement to school; b) reimbursement for all past psychiatric and psychological services; c) behavioral services; d) payment for his psychologist to participate in developing the behavioral services; e) independent psychiatric, psychological, learning and social work evaluations; f) transportation to and from all evaluations; and g) reimbursement for the cost of his psychologist participating at an "IEP meeting." Pet. App. 3a-5a.

REASONS FOR DENYING THE PETITION

C.B.E. has cited neither a conflict with a decision of this Court, nor a conflict among the circuit courts, regarding any issue material to this case. The Petition should therefore be denied.

I. The Third Circuit's Holding that Respondents Satisfied the *Buckhannon* Prevailing Party Standard by Obtaining Judicially Enforceable Final Administrative Consent Orders does not Conflict with the Decisions of this Court or any Circuit Court

P.N.'s right to prevailing party attorney's fees is authorized by the Individuals with Disabilities Education Act which provides: "In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs ... to a prevailing party who is the parent of a child with a disability...." 20 U.S.C. § 1415(i)(3)(B)(i). This Court has held that a "prevailing party" is "one who has been awarded some relief by the court." *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep't of Health and Human Resources*, 532 U.S. 598, 603 (2001). A party who has obtained a settlement agreement is entitled to "prevailing party" status, provided there was a "judicially sanctioned change in the legal relationship of the parties." *Id.* at 604-05.

C.B.E. takes the novel position, unsupported by precedent, that an administrative consent order does not meet the "judicially sanctioned" requirement -- merely because it is enforceable by a court, rather than by the administrative law judge who issued it. Pet. 9. Both the District Court and the Third Circuit, relying on Supreme Court and other circuit court cases, resoundingly and correctly rejected C.B.E.'s argument. Moreover, C.B.E.'s claim that the Third Circuit decision is at odds with Supreme Court and other circuit court decisions is wholly without merit.

The Third Circuit, relying on this Court's opinion in

Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375 (1994), first recognized that settlement agreements are enforceable by a court:

> 'if the parties' obligation to comply with the terms of the settlement agreement had been made part of the order of dismissal... [i]n that event, a breach of the agreement would be a violation of the order and ... jurisdiction to enforce the agreement would therefore exist.'

Pet. App. 10a, *citing Kokkonen*, 511 U.S. at 381. Then, citing to the Second Circuit decision in *A.R. v. New York City Dep't of Educ.*, 407 F.3d 65 (2d Cir. 2005) – which is on all fours with *P.N.* but was inexplicably omitted from the Petition by C.B.E. – the Third Circuit determined that an administrative order that incorporates the terms of the settlement pursuant to *Kokkonen* complies with the "judicial *imprimatur*" requirement of *Buckhannon* as the order is "enforceable through an action under 42 U.S.C. § 1983 and under state law." Pet. App. 13a. In addition, again citing to *A.R.*, the Third Circuit stated that "'the fact that IHOs [(the equivalent of administrative law judges)], as is common in administrative procedures, have no enforcement mechanism ... is irrelevant, at least so long as judicial enforcement is available.'" Pet. App. 11a-12a, *citing A.R.*, 407 F.3d at 78, n.13. The Third Circuit thus held that "'the combination of administrative *imprimatur*, the change in the legal relationship of the parties arising from it, and subsequent judicial enforceability, render such a winning party a 'prevailing party' under Buckhannon's principles.'" Pet. App. 11a, *citing A.R.*, 407 F.3d at 76.

Notwithstanding the Third Circuit's reliance on *Kokkonen* and *A.R.*, C.B.E. argues that there is a conflict with the Supreme Court and other circuit courts. Clearly no conflict exists.

C.B.E. erroneously argues that the Eighth Circuit's decision in *Christina A. v. Bloomberg*, 315 F.3d 990 (8th Cir.2003), Pet. 6-7,

is incompatible with the *P.N.* decision. *Christina A.* does not even concern a final administrative consent order; rather, it concerns a district court's approval of a class action settlement that the Eighth Circuit found was "merely an exercise in compliance with Rule 23(e)." *Id.* at 992. In addition, unlike the consent order in *P.N.*, in *Christina A.*, "no specifically enumerated contract terms were incorporated into the court's order," *id.* at 993, and the order would "not support a citation for contempt," *id.* Moreover, the consent orders in *P.N.*, "unlike those in *Christina A.*," were enforceable through an action under 42 U.S.C. § 1983 and under state law. Pet. App. 13a.

In fact, the *Christina A.* decision comports entirely with the *P.N.* decision. The *Christina A.* Court, like the *P.N.* Court, recognized that an order that incorporates the terms of the settlement, and is judicially enforceable, constitutes a *Buckhannon*-worthy consent decree. *Christina A.*, 315 F.3d at 993.[1]

C.B.E. also incorrectly claims that the First Circuit's decision in *Smith v. Fitchburg Pub. Sch.*, 401 F.3d 16 (1st Cir. 2005), conflicts with the Third Circuit's view of judicial *imprimatur*. Pet. 7. Once again, that case does not involve a final administrative consent order. Rather, as C.B.E. itself states, Pet. 7, it involves a private settlement and a dismissal order. *See Smith*, 401 F.3d at 21. Moreover, the Third Circuit's opinion is squarely in agreement with the First Circuit's view in *Smith* that, "[i]t is **undisputed** that, for purposes of the IDEA, a party may 'prevail' in an administrative hearing--thus the appropriate involvement of a ... hearing officer can provide the necessary 'judicial *imprimatur*.'" *Id.* at 22, n. 9 (emphasis added).

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1 The fact that orders subject to N.J.A.C. 1:1-19.1 and Fed. R. Civ. P. 23(e) may, as C.B.E. suggests, be similar in that they both are "required," Pet. 7, does not negate the fact that the orders in this case that were subject to N.J.A.C. 1:1-19.1 are judicially enforceable, as set forth above, while the order in *Christina A.* that was subject to Fed. R. Civ. P. 23(e), was not.

In addition, the Third Circuit's holding in *P.N.* is in accordance with the First Circuit's holding that final administrative orders that incorporate the parties' settlements confer the judicial *imprimatur* necessary for prevailing party status. *See Smith*, 401 F.3d at 23 (recognizing that a "private settlement ... incorporated into a consent decree" would "satisfy the requirements of a narrow reading of *Buckhannon*").

C.B.E.'s attempt to show a conflict with the D.C. Circuit, Pet. 7-8, is equally unavailing. Here too, the court in *Rice Services, Ltd. v. United States*, 405 F.3d 1017 (D.C. Cir. 2005) recognized, as did the Third Circuit in *P.N.*, that an enforceable consent order passes *Buckhannon* muster, *Rice Services*, 405 F.3d. at 1026, and, again, the order at issue, unlike the *P.N.* orders, did not incorporate the terms of settlement, but rather dismissed the case as "essentially moot," *Rice Services*, 405 F.3d. at 1026-27.

C.B.E. also erroneously maintains that the Fourth Circuit is in disagreement with *P.N.* Pet. 9. That contention is based on incorrectly reading *Smyth v. Rivero*, 282 F.3d 268 (4th Cir. 2002) to require – as a prerequisite for prevailing party status -- that the body that issues a consent order must itself have the power to enforce the order. In fact, the Fourth Circuit, citing *Kokkonen*, 511 U.S. at 381, held only that for a consent order to comply with *Buckhannon*, it must "incorporat[e] the terms of the agreement into that order **or** retain jurisdiction[]." *Id.* at 283 (emphasis added). Thus, the Third Circuit's reliance on the incorporation of the settlement terms in the *P.N.* orders comports precisely with the Fourth Circuit holding in *Smyth*.

The Third Circuit's holding -- that the *Buckhannon* prevailing party requirement was satisfied by the judicially enforceable administrative consent orders that incorporated the parties' settlement -- is in accord with the decisions of this Court and the other circuit courts. The Petition should therefore be denied.

II. The Third Circuit – Consistent with the Decisions of this Court and Every Other Circuit Court to Address the Issue – Properly Held that Respondents were Prevailing Parties because they Succeeded on all Significant Issues of the Litigation

The standard for determining whether a party is a "prevailing party" is well established by this court. Where parties obtain "some of the relief they sought," *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 793 (1989), they "'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust,'" *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (internal citations omitted). The only clear exception to the "generous formulation" of prevailing party status is where the plaintiff's success is "purely technical or *de minimus*." *Texas State Teachers*, 489 U.S. at 793. A "technical" or "*de minimus*" victory is one that does not alter the defendant's behavior towards a plaintiff. *Farrar v. Hobby*, 506 U.S. 103, 114 (1992). This Court has held that even "a plaintiff who wins nominal damages [of one dollar] is a prevailing party...." *Id.* at 112. To the extent the degree of relief is relevant, it is relevant only to the amount of the fee award, not to the fee award's availability. *Texas State Teachers*, 489 U.S. at 782.

The Third Circuit relied extensively on the *Hensley* -- *Texas State Teachers* -- *Farrar* trilogy in holding that P.N. was a prevailing party. Pet. App. 13a-18a. The *P.N.* Court held that

> Plaintiffs obtained orders from the ALJ requiring that each of ... [his] demands be met. The Orders benefited P.N. and forced CBE to change its behavior, thus altering their legal relationship. As such, the Orders meet the standards enunciated by the Supreme Court.

Pet. App. 15a-16a.

The Supreme Court prevailing party standards are also followed by all the other circuit court cases cited by C.B.E. All that is different amongst the courts is the ultimate fee determinations, but this, of course, is because the facts of each case differ. [2] C.B.E.'s argument that there is a conflict amongst the circuits regarding the prevailing party standard reflects nothing more than C.B.E.'s unhappiness with the results in this case, and the argument should not be credited.[3]

The cases C.B.E. claims conflict with the *P.N.* opinion, Pet. 10-12, are factually distinct. In *Linda T. v. Rice Lake Area Sch. Dist.*, 417 F.3d 704 (7th Cir. 2005), *Monticello Sch. Dist. No. 25 v. George L.*, 102 F.3d 895 (7th Cir. 1996) and *Park v. Anaheim Union High Sch. Dist.*, 444 F.3d 1149 (9th Cir. 2006), *panel rehearing and rehearing en banc requested* (May 8, 2006), the plaintiffs failed to prevail on almost all the issues in their cases and received minimal relief in relation to what was sought. P.N., in stark contrast, achieved success on every claim and obtained even more relief than he sought, including obtaining such significant relief as his unconditional reinstatement to school, numerous services from

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2 It is instructive to look at a case which C.B.E. did not cite but which was issued by one of the circuits which C.B.E. claims to conflict with the *P.N.* decision. In *Shapiro v. Paradise Valley Unified Sch. Dist. No. 69*, 374 F.3d 857 (9th Cir. 2004), a Ninth Circuit case not cited by C.B.E., the plaintiff, like P.N., received more relief than did the plaintiff in the Ninth Circuit case cited by C.B.E., *Park v. Anaheim Union High Sch. Dist.*, 444 F.3d 1149 (9th Cir. 2006), *panel rehearing and rehearing en banc requested* (May 8, 2006). Notably, the *Shapiro* Court followed the same Supreme Court standards as did the *Park* Court– and as did the *P.N.* Court – but, in contrast to the *Park* Court, the *Shapiro* Court determined the plaintiff to be a prevailing party and rejected the defendant's *de minimus* argument. The difference between the *Park* and the *Shapiro* cases was the relief obtained, not the prevailing party standards followed.

3 Moreover, C.B.E.'s criticism of the results in this case employs a minimization of the relief awarded to P.N. Contrary to C.B.E.'s numerous statements to the effect that all P.N. received was $425, *see, e.g.*, Pet. i, ii and 15, P.N. in fact received extensive relief, as the Petition itself, with its three-page-long quote from the Consent Orders, recognizes. Pet. 2-4.

C.B.E. and financial reimbursement, all of which greatly changed the legal relationship of the parties.

The Third Circuit followed Supreme Court precedent in determining that the relief obtained by P.N. was not *de minimus*, and no conflict, let alone a conflict worthy of this Court's review, exists amongst the circuit courts regarding the *de minimus* standard. C.B.E.'s Petition should therefore be denied.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be denied.

Respectfully submitted,

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